United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

75-4021

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS & DISTRIBUTORS, NO. 75-4021
WARNER BROS., INC., *ET AL.*, NO. 75-4024
SANDY FRANK PROGRAM SALES, INC., NO. 75-4025
WESTINGHOUSE BROADCASTING COMPANY, INC., NO. 75-4026
CBS INC., NO. _____

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,

Respondents,

AMERICAN BROADCASTING COMPANIES, INC.,
CBS INC.,
NATIONAL BROADCASTING COMPANY, INC.,
WARNER BROS., INC., *ET AL.*,
WESTINGHOUSE BROADCASTING COMPANY, INC.,

Intervenors.

ON PETITIONS FOR REVIEW OF SECOND REPORT AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENOR
AMERICAN BROADCASTING COMPANIES, INC.

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ISSUES PRESENTED

1. Whether PTAR III is consistent with the First Amendment to the United States Constitution and with Section 326 of the Communications Act of 1934, as amended.

2. Whether the Commission's adoption of revisions in the Prime Time Access Rule was a reasonable exercise of administrative discretion.

3. Whether the September 1975 effective date for PTAR III changes is reasonable.

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COUNTERSTATEMENT OF THE CASE

American Broadcasting Companies, Inc. (ABC) adopts the Counterstatement of the Case set forth in the Brief of the Federal Communications Commission (Commission). In addition, ABC submits the following information concerning its own relationship to the original Prime Time Access Rule and to the revisions thereof contemplated by the Second Report and Order in the Commission's Docket No. 19622.*/

Although ABC did not urge adoption of the original Prime Time Access Rule (PTAR I), it acknowledged the Rule to be the least objectionable of the several restraints upon network operations which the Commission was considering. And ABC undertook, if the Commission adopted the Rule, to cooperate in trying to make it effective. For example, ABC did not challenge PTAR I in the Mt. Mansfield proceeding.**/

In 1973 Comments and at Oral Argument prior to the February 1974 Report and Order and in Further Comments

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*/ The Second Report and Order, released January 17, 1975, is reproduced at Joint Appendix (JA) 084.

**/ Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971).

following this Court's June 1974 decision in National Association of Independent Television Producers and Distributors v. FCC, 502 F.2d 249 (2d Cir. 1974), ABC supported retention of the original Rule with only slight, perfecting changes. In particular ABC stressed the need for more time to give the Rule a fully meaningful test. In many respects its position was similar to that of Petitioners, National Association of Independent Television Producers and Distributors (NAITPD) and Westinghouse Broadcasting Company, Inc. (Westinghouse). Although ABC supported retention of the original Rule rather than the more substantive modifications reflected in both PTAR II and PTAR III,*/ as in 1970 it has accepted the Commission's decision as a reasonable exercise of regulatory discretion. At this juncture ABC is again prepared to cooperate in trying to make PTAR III effective.

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*/ The Briefs of Petitioners NAITPD, Westinghouse and CBS Inc. (CBS) challenge Exemption (1) to PTAR III -- that for children's, documentary and public affairs programs. ABC agrees that this Exemption represents a change of substance. Exemptions (2) through (6) are the types of changes which ABC recommended -- principally codification of those waiver policies which have become an accepted part of PTAR I.

The Brief of Petitioner Sandy Frank Program Sales, Inc. appears to be similarly directed.

In 1973 Comments and Oral Argument, ABC also pointed out that one of the unanticipated but important public interest benefits following from the Rule was enhanced inter-network competition. The following is reproduced from pages 17 and 18 of those Comments (January 15, 1973):

> Enhanced Inter-network Competition. For many years the Commission has been concerned with problems of inter-network competition, including specifically ABC's competitive disadvantage (stemming from its shorter lineup of affiliated stations) and the implications of that disadvantage for program service which ABC can offer. From 1963 through 1971 the ABC Television Network operated at substantial losses, totaling in excess of 100 million dollars. During that same period, the CBS and NBC Television Networks operated at substantial profits, in excess of 600 million dollars on a combined basis.
>
> The Prime Time Access Rule, which resulted in a cutback of network schedules to three hours per night, has had beneficial effects for ABC (and may well have been beneficial for other networks as well). . . . 1972 has seen the ABC Television Network show a profit for the first time since 1962. While various factors have contributed to that result, the shorter evening schedule has been beneficial, resulting in better clearances for network programs.
>
> There are distinct public interest benefits associated with the ABC Television Network being profitable. These include the ability to expand and improve news and public affairs programming and the ability to undertake other improvements in network program service, such as ABC has done, and is doing, in the areas of children's programming and specials.*/ These facts have been so frequently recognized by the Commission that they hardly need be repeated here.

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*/ ABC has undertaken to present increasing numbers of specials -- both in the entertainment and news/public affairs categories. For the First Quarter of 1973 alone, ABC has already scheduled more than 30 hours of special programs (exclusive of the live news coverage) in the prime time hours 8:00 - 11:00 p.m. (NYT).

In 1974 Further Comments, ABC furnished additional information concerning how the advent of profitability for the ABC Television Network had been translated into important improvements in the program services which ABC offers. These improvements relate to news, public affairs, children's programming, entertainment and other specials, and the operation of ABC's owned stations.

As the Second Report and Order concluded, in discussing "other benefits" flowing from the Rule: "There is increased programming of a public service character presented by ABC as a result of its greater profitability under the Rule" (para. 17; JA-094).

Before the Commission, ABC also urged that another important benefit which the Rule had brought about was the practice by some stations, particularly in the larger television markets, of filling some of the access time with locally originated news and public affairs programming responsive to local community needs and interests. Documentation of the increasing prevalence of this practice was furnished.

In the Second Report and Order the Commission took specific cognizance of the "local programming activities which have been stimulated, including those mentioned by the various minority and other citizens' groups" (para. 15; JA-092). In conclusion, the Commission observed:

> As mentioned above, one of the really significant benefits from the rule is its impetus to the development of local programming efforts, and this is one of the principal reasons for retaining it in a form close to PTAR I. We expect that stations subject to the rule will devote an appropriate portion of "cleared time," or at least of total prime time to material particularly directed to the needs or problems of the station's community and area as disclosed in its regular efforts to ascertain community needs, including programming addressed to the special needs of minority groups. Such programming efforts are necessary if the benefit of the rule in stimulating locally meaningful programming is to be significantly achieved, as well as to carry out the licensee's obligation to serve the public interest. (para. 60; JA-114)

ARGUMENT

I. PTAR III IS FULLY CONSISTENT WITH THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND WITH SECTION 326 OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED

Petitioners variously challenge PTAR III as being inconsistent with the First Amendment to the United States Constitution and/or Section 326 of the Communications Act of 1934, as amended (47 U.S.C. §326). Specifically, NAITPD, Westinghouse, CBS, and, to some extent, Sandy Frank Program Sales, Inc. (Frank) contend that the Exemption (1) provision with respect to children's, documentary and public affairs programs is constitutionally offensive and in the nature of censorship, while they

apparently accept the lawfulness of the balance of the revised Rule. Warner Bros., Inc., et al. (Warner) renew their challenge, based upon constitutional and other grounds, to any access rule, including PTAR I. We first address the contentions of those who challenge the Exemption (1) provisions as being unconstitutional and in the nature of censorship.

A. Exemption (1) Is In Furtherance Of First Amendment Objectives And Not A Restraint

To put this matter in some perspective, it should be recognized that PTAR III*/ is similar in major respects to PTAR I, which this Court affirmed, against a First Amendment challenge by CBS and others, in Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971). This is true not only as to the substance of the Rule, but also as to its concept. Thus, both PTAR I and PTAR III impose restrictions upon licensees as to the source of programming which may be carried during one prime time hour only out of the entire broadcast day. PTAR I excludes from the access hour network programs, off-network programs and feature films which have been broadcast in the market within two years. PTAR III excludes, from the access hour only, network programs and off-network programs, including such feature films as are off-network. Further, PTAR I makes

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*/ The text of PTAR III is reproduced as Appendix A to this Brief.

exemptions for certain kinds (generic categories) of network programs; thus exempted from PTAR I are special news programs dealing with fast breaking news events, on-the-spot coverage of news events, and political broadcasts by legally qualified candidates for public office. In addition, the Commission's Report and Order in Docket No. 12782*/ adopting PTAR I anticipated routinely granted waivers for network newscasts when preceded by one hour of local news and sports runovers (footnotes 35 and 36).**/ PTAR III continues these exemptions for the indicated kinds of programs, and expands them to embrace some other kinds of programs.

Finally, it should be recognized that neither PTAR I nor PTAR III requires the presentation of the exempted kinds of programs. Thus, while both versions of the Rule recognize that certain kinds of programs are so affected with the public interest that they should not be the subject of restriction based upon program source, both fall short of mandating their presentation in access time.

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*/ Network Television Broadcasting, 23 F.C.C.2d 382, 18 R.R.2d 1825 (1970).

**/ By waivers requested by CBS and others, one-time-only news and public affairs programs have also been exempted. See, e.g., Prime Time Access Rule, 32 F.C.C.2d 55, 23 R.R.2d 77 (1971).

Various Petitioners use as their point of departure the precept that governmental regulation on the basis of the content of speech is presumptively invalid under the First Amendment. While this may be true as a general matter, ABC believes that in approaching the issues in this proceeding it is more instructive to begin with the teachings of the Courts as to what the First Amendment means in the unique broadcast field.

In Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), the Supreme Court upheld the Commission's Fairness Doctrine against First Amendment and Sectiom 326 attack. The Fairness Doctrine requires the presentation of a balance of views on controversial issues of public importance. While acknowledging that important First Amendment rights accrue to broadcasters, the Court stressed the public's right to have the broadcast media function consistent with the ends and purposes of the First Amendment. Thus, it said:

> It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.

(395 U.S. at 390).

In upholding PTAR I in the Mt. Mansfield proceeding, this Court relied upon the Supreme Court's Red Lion holding as well as upon the Supreme Court's action in National Broadcasting Co. v. United States, 319 U.S. 190 (1943), which affirmed the Commission's original network rules (of which PTAR is an extension) against First Amendment challenge. */

Although Petitioners acknowledge the existence of Red Lion, they focus upon certain cautionary language to the effect that the Commission may not have "a free hand to vindicate its own idiosyncratic conception of the public interest" (395 U.S. at 395) or refuse to permit the broadcast of some particular program. Yet nothing could be farther from what the Commission has done here.

First, no station is prohibited from carrying any kind of program, nor is any station required to carry any kind of program. Although PTAR III continues generally to limit stations with respect to the source (network or off-network) of programs which may be broadcast during prime time one hour of the day only, this provision was found in Mt. Mansfield to be in furtherance of the First Amendment objectives.

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*/ The Supreme Court made clear that the Commission was properly concerned with the "composition of [the broadcast] traffic" (319 U.S. at 216).

Second, the effect of Exemption (1) is simply to permit, at the licensee's sole discretion, the use of network or off-network children's, documentary or public affairs programs. The Second Report and Order makes clear that one reason for adding Exemption (1) was a belief that PTAR I had resulted in some reduction in the amount of these kinds of programs or in inappropriate scheduling for some of them (para. 29; JA-099). By creating Exemption (1) the Commission was acting in furtherance of the public's right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences", including the right of children to such access.

In Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied sub nom. Tobacco Institute v. FCC, 396 U.S. 842 (1969), upon which Petitioner NAITPD relies, the Court of Appeals articulated the premise that "in applying the public interest standard to programming, the Commission walks a tightrope between saying too much and saying too little" and that "[i]n most areas it has resolved this dilemma by imposing only general affirmative duties". The Court then pointed out that given the Commission's "long-established authority to consider program content, this general approach probably minimizes the dangers of censorship or pervasive supervision" (405 F.2d at 1095).

With respect to Exemption (1), the Commission has not even imposed a general affirmative duty. It has merely relaxed an otherwise judicially-approved restraint to permit the presentation of certain kinds of programs affected with the public interest irrespective of source -- all at the sole discretion of the licensees. */

Contrary to the contentions of some Petitioners, the Commission's Exemption (1) is not inconsistent with Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973). In the CBS case, the Supreme Court rejected the concept of a right of public access to the broadcast media for the discussion of controversial issues, in favor of the traditional approach of licensee responsibility and discretion. However, this position presumed that licensees had an obligation to present controversial issue programming consistent with the Fairness Doctrine, inasmuch as such programming is affected with the public interest. Here, the Commission's Exemption (1) provision is intended to facilitate the presentation

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*/ The Commission went out of its way to point out that Exemption (1) was intended to open up "an option for licensees to use such additional network material if, in light of their programming judgments as licensee-trustees meeting the needs, tastes, interests and problems of their coverage areas, they deem it appropriate to do so" and that "[t]here is intended no requirement, or even a suggestion, that such additional network programming should be carried". Second Report and Order, para. 35; JA-103.

of public affairs, documentary and children's programming -- all similarly affected with the public interest. Again, responsibility and discretion are entrusted to licensees.

Certain Petitioners challenge as constitutionally offensive the Commission's statement that it expects networks and licensees not to abuse Exemption (1) (para. 31; JA-101). Any suggestion that this expectation is a restraint upon the amount of network or off-network children's, documentary or public affairs programs which networks or licensees may present is untenable in view of the fact that the Commission's discussion relates only to one hour per day. While acting to relax the Rule in limited respect, the Commission emphasized that it continues "to attach high importance to the rule as a limit on network dominance over station time, and as a means of opening up substantial amounts of prime time to sources of new non-network programming, be they producers and distributors for syndication, or local sources". Second Report and Order, para. 34; JA-103.

That Exemption (1) categories are generally affected with the public interest and are in furtherance of the public's First Amendment rights is supported by a number of Commission actions and policies.

In the Report and Statement of Policy Res: Commission en banc Programming Inquiry, 44 F.C.C. 2303, 20 R.R. 1902 (1960), the Commission set out certain generic categories of broadcast service which it considers necessary or desirable to serve the broadcast needs and interests of the public. These categories include, inter alia: programs for children; public affairs programs; educational programs; political broadcasts and sports programs. The public interest significance of these types of programs is so highly regarded that the full list is reprinted in an Attachment to each application form: for Commission authority to construct a new broadcast station or make changes in an existing station (FCC Form 301); for renewal of broadcast station license (FCC Form 303); and for Commission consent to assignment or transfer of a broadcast station construction permit or license (FCC Forms 314 and 315). (The Attachment is reproduced as Appendix B of this Brief.) Furthermore, the Commission requires in these applications a statistical breakdown of the minimum hours proposed to be devoted each week to news, public affairs and "other" non-entertainment and non-sports programming.

Not only must applicants make representations with respect to the amount of news, public affairs and "other" non-entertainment and non-sports programming which they propose to broadcast, television licensees must report annually, using FCC Form 303-A, the amount of, and information about, the programs actually broadcast in these categories for a composite week during the preceding year. See Final Report and Order in Docket No. 19153, 43 F.C.C.2d 1; 27 R.R.2d. 553 (1973). These Annual Programming Reports are considered in connection with a station's license renewal application. That the Commission has established prima facie minimums for these categories collectively is suggested by the fact that it has delegated to the Chief, Broadcast Bureau, authority to grant renewal applications only where such minimums are met. See 47 C.F.R. § 0.281(a)(8)(i).

By Notice of Inquiry in Docket No. 19154, Pike & Fischer Radio Regulation Current Service 53:429 (1971), the Commission has emphasized its belief that local broadcasts and programming designed to inform the local electorate (news and public affairs) are essential to furnish "substantial [broadcast] service" in the public interest. This proceeding has under consideration the adoption of minimum standards for categories of programs to warrant

renewal over a competing applicant, regardless of other comparative considerations.

And in the Fairness Report, 48 F.C.C.2d 1, 30 R.R. 2d 1261 (1974), reaffirming the Fairness Doctrine which was upheld in Red Lion, supra, the Commission said: "stripped to its barest essentials, the fairness doctrine involves a two-fold duty: (1) the broadcaster must devote a reasonable percentage of this broadcast time to the coverage of public issues; and (2) his coverage of these issues must be fair in the sense that it provides an opportunity for the presentation of contrasting points of view" (emphasis added; 40 F.C.C.2d at 7; 30 R.R.2d at 1273).

The significance which the Commission attaches to children's programming is underscored by two recent actions. First, by Final Report and Order in Docket No. 19153, relating to license renewal procedures, the Commission added a new question to the television station renewal form which reads as follows:

> 6. In Exhibit No. _____ give a brief description of programs, program segments or program series broadcast during the license period which were primarily directed to children twelve years old and under. Indicate the source, time and day of broadcast, frequency of broadcast, and program type.

(See 43 F.C.C.2d 1, 57; 27 R.R.2d 535, 613 (1973)). Second, the Commission recently promulgated its Children's Television Report and Policy Statement (Docket No. 19142, released October 31, 1974) */ which defines licensee obligations with respect to the presentation of programming intended for children twelve and under. As there noted, the Commission was prompted to its initiative in the children's programming area by the strong expressions of interest from public groups and a massive outpouring of public expression. ___F.C.C.2d at ___; 31 R.R.2d at 1321 (1974). It should be noted that the definition of children's programming used for purposes of the Exemption (1) is the same at that utilized in the Children's Television Report and Policy Statement (and corresponds to the relevant new question in the television renewal form).

Thus, the Commission was not really making any new intrusion into the programming area with its Exemption (1) provision for children's, documentary and public affairs programs. **/ Both children's and public affairs programs,

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*/ ___ F.C.C.2d ___; 31 R.R.2d 1228 (1974).

**/ Children's and documentary programs are specifically defined in PTAR III at Note 2 (see Appendix A hereto). Public affairs programs are defined at 47 C.F.R. §73.670, Note 1 and in the Commission's applications as follows: "Public affairs programs (PA) include talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, round tables, and similar programming primarily concerning local, national, and international public affairs."

including public affairs documentaries, are matters of long standing Commission interest and regulatory initiative. Moreover, the inclusion of documentaries other than of a public affairs nature is simply a generic way of characterizing various kinds of non-fictional programming such as the Commission treats in its "other" categories (e.g., instructional programs, religious programs, agricultural programs).

Certain parties challenge the children's, documentary and public affairs categories as being impermissibly vague. It is true, of course, that these program categories are somewhat general in their nature, and it is possible for reasonable men to differ as to whether a particular program falls within or without a particular category. But this problem is inherent in the use of program categories for the various purposes to which they are put by the Commission, and many years of experience using such definitions on a day-to-day basis shows them to be comprehensible.

As this Court observed in a similar context in Lafayette Radio Electronics Corp. v. United States, 345 F.2d 278, 281-82 (1965):

> The FCC is not to be faulted simply because ingenuity can imagine borderline cases where a conscientious licensee might have fair doubt whether his communications were banned or not. In that event, he need only inquire, 5 U.S.C. § 1004(d), 47 C.F.R. § 1.2 (1964); and counsel for the Commission have assured us, as we would have supposed in any event, that, except in most flagrant cases, the Commission does not invoke the sanctions of revocation or fines, 47 U.S.C. §§312, 510, save after giving the licensee warning and opportunity to amend his ways. We have recently indicated, with respect to another agency, our refusal to be persuaded "as to the genuineness of fears that a great agency of government like the Commission will behave in any such literalistic and arbitrary fashion as petitioners suggest." Heavenly Creations, Inc. v. FTC, 339 F.2d 7, 9 (2 Cir. 1964), cert. denied, 85 S.Ct. 1089 (1965).

See also California Citizens Ban Association v. United States, 375 F.2d 43, 55 (9th Cir.), cert. denied, 389 U.S. 844 (1967).

Petitioners CBS and Westinghouse are both licensees of multiple television stations. They routinely file applications, and they routinely maintain program logs (see 47 C.F.R. §73.670). They are obviously familiar with the children's and public affairs categories, because they are routinely required to report their programming activities in these categories. While the Commission has not heretofore, to our knowledge, recognized a documentary category as such, the Commission's definition of public affairs comprehends certain types of documentaries and the definition provided in the Second Report and Order provides the same kind of guidance that the other program definitions utilized by the Commission furnish.

Finally, it is significant that Exemption (1) (and other exemptions) will have the salutary effect of relieving the Commission of case-by-case consideration of waiver requests -- substituting therefor generic categories to be interpreted principally by licensees. While the Second Report and Order offers some guidance by way of examples of programs falling within particular categories, there is no indication that the Commission intends any unusual degree of review of particular programs by classification. The Commission will have the same responsibility with respect to the Exemption (1) categories and how licensees characterize particular programs as it now has with respect to its application forms and the required Annual Programming Reports and how licensees characterize particular programs for those purposes.

In ABC's judgment the Exemption (1) program categories are ones long-recognized to be affected with the public interest, sufficiently defined to be understood by licensees, and not a novel or prohibited Commission incursion into the programming area.

B. Continuation Of An Access Rule, With Or Without Exemption (1), Is Lawful

The Warner Petitioners challenge not only the constitutionality of Exemption (1) but also the constitutionality of the basic access rule, with or without Exemption (1). In this connection they also focus upon the provision in the Rule whereby off-network programming, including off-network feature films, may not be utilized in the access period. */

The basic answer to the Warner position is that this Court, in its Mt. Mansfield decision, found PTAR I to be in furtherance of First Amendment objectives. While the Court recognized, as did the Commission, the experimental nature of the Rule and the possibility that the constitutional question might be reopened if the Rule proved ineffective, the fact is that the Commission has found that the experiment should continue, because the Rule has not had an adequate test, and because it is accomplishing both basic purposes and other public interest goals.

The Warner arguments were forcefully advanced before the Commission and are carefully considered in the Second Report and Order. The Commission has simply not agreed with Warner and the bits and pieces of evidence upon which

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*/ Intervenor Motion Picture Association of America, Inc. (MPAA) directs its Brief entirely to the revised restriction with respect to off-network feature films.

it relies; the Commission has given its reasons and cited other, more persuasive, evidence. As discussed under Argument, Point II, infra, the Commission's decision to continue the Rule is reasonable and should not be disturbed even if, which we do not assume, this Court would have reached a different substantive result.

In connection with the Warner Petitioners' argument that PTAR I has not generated a diversity of programming, it is particularly important to bear in mind, as the Commission found, that the Rule has operated to date in a climate of various uncertainties. Thus, no sooner did it take full effect in October 1972 (during the prior year, the off-network provision was not applicable) than the Commission commenced its Docket No. 19622 overview proceeding, which has still not come to an end. The record is replete with evidence that uncertainties have distorted experience under the Rule to date. See Second Report and Order, para. 18; JA-095. Notwithstanding this fact, the Second Report and Order also makes clear the Commission's view that the Rule is accomplishing various of its objectives, including the objective of placing greater responsibility at the station level for the selection of programming with respect to at least one prime time hour per day.

It is also proper for the Commission to consider other effects which the Rule has had. One of these other effects is enhanced competition among networks. Nor was this a matter with which the Commission was wholly unconcerned even in 1970, for it chose PTAR I over another remedial course under consideration in Docket No. 12782 in significant part because the latter would impair ABC's competitive position.*/ Not only has the Rule which the Commission adopted not been harmful to ABC, but it has contributed to ABC becoming fully competitive with the other national television networks, and it has thereby contributed to ABC's ability more fully to discharge its public service responsibilities.

Another of these effects is the use by licensees of the access period for local programming, typically news and public affairs, responsive to ascertained local community needs and interests. See Second Report and Order, paras. 15, 60; JA-092, 114. Such programming is fumdamental to the Communications Act regulatory scheme.

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*/ Network Television Broadcasting, 23 F.C.C.2d 382, 384, 18 R.R.2d 1825, 1828, reconsideration generally denied, 25 F.C.C.2d 318, 19 R.R.2d 1869 (1970), aff'd sub nom. Mt. Mansfield Television, Inc. v. FCC, 442. F.2d 470 (2d Cir. 1971).

See Henry v. FCC, 302 F.2d 191 (D.C.Cir.), cert. denied, 371 U.S. 821 (1962); Fairness Report, 48 F.C.C.2d 1, 30 R.R.2d 1261 (1974); Final Report and Order in Docket No. 19153, 43 F.C.C. 2d 1, 27 R.R.2d 553 (1973); Primer On Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650, 21 R.R.2d 1507 (1971); Report and Statement of Policy Re: Commission en banc Programming Inquiry, 44 F.C.C. 2303, 20 R.R. 1902 (1960).

The Warner Petitioners continue to take issue with the off-network restriction and now with the refinement in that restriction embodied in PTAR III. In the Mt. Mansfield decision this Court approved an off-network and feature film restriction, since the Commission had concluded that the overall objectives of the Rule would be facilitated by such a restriction. Inasmuch as the Commission continues to hold out basically the same objectives and continues to believe that an off-network restriction is needed, its justification is not reduced.

As for the changes in the off-network and feature film restriction which the Commission has provided -- that all off-network programs are to be excluded from the access period (except as exempted), with no separate provision for feature films -- PTAR III is more directly and logically related to the objective of opening up one

hour per night for programming which has no network connection, present or past. While this is a somewhat stricter limitation in the case of some feature films, it is less strict for those films which have recently, within two years, appeared in the market and which are not off-network. In any event, its justification is basically the same as in the case of PTAR I.

II. PTAR III IS A RATIONAL EXERCISE OF COMMISSION DISCRETION IN FORMULATING A REGULATORY REMEDY

Apart from the contention that PTAR III is not consistent with the First Amendment and Section 326, certain Petitioners also challenge the reasonableness of the Commission's action in making changes to relax the Rule in limited respects. In response, it is appropriate, as a threshold matter, to set forth the applicable principles governing judicial review of this aspect to Petitioners' challenge to the Second Report and Order.

The Court's function was clearly described in Radio Relay Corp. v. FCC, 409 F.2d 322 (2d Cir. 1969), as follows:

> In such cases our task is limited to determining "whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear"; that is, "whether the Commission has

> fairly exercised its discretion within the vaguish, penumbral bounds expressed by the standard of "public interest." F.C.C. v. RCA Communications, Inc., 346 U.S. 86, 91, 73 S.Ct. 998, 97 L.Ed. 1470 (1953). Thus, "courts should not overrule an administrative decision merely because they disagree with its wisdom," but only if they find it to be "arbitrary or against the public interest as a matter of law." Radio Corp. v. United States, 341 U.S. 412, 420, 71 S.Ct. 806, 810, 95 L.Ed. 1062 (1951).

(409 F.2d at 326). The applicability of this standard to the Commission's adoption of PTAR I was specifically acknowledged in Mt. Mansfield, supra at 482:

> We should not, and indeed cannot, substitute our judgment for that of the Commission, Cornell University v. United States, 427 F.2d 680, 683 (2d Cir. 1970), nor inject "our personal views regarding the effective utilization" of the communications media, National Broadcasting Co., Inc., supra, 319 U.S. at 218, 63 S.Ct. at 1010.

This particular case is a sequal to Mt. Mansfield, where this Court, following the afore-stated standard for review, affirmed the Commission's adoption of PTAR I and the related Syndicated and Financial Interest Rules (47 C.F.R. §73.658(j), which have since been implemented and which are not here at issue).

That it was appropriate for the Commission to undertake to review and revise the Prime Time Access Rule is underscored by American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir. 1966),where the Court observed that

"[i]t is part of the genius of the administrative process that its flexibility permits adoption of approaches subject to expeditious adjustment in the light of experience" and that "it is the obligation of an agency to make re-examinations and adjustments in the light of experience" (359 F.2d at 633). This is the same rationale as expressed by the Supreme Court in American Trucking Ass'n. v. A.T. & S.F.RR. Co., 387 U.S. 397 (1967), where it held:

> . . . the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. Compare SEC v. Chenery Corp., 332 U.S. 194 . . . (1947); FCC v. WOKO, 329 U.S. 223 . . . (1946). In fact, although we make no judgment as to the policy aspects of the Commission's action, this kind of flexibility and adaptability to changing needs and patterns . . . is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and future within the inflexible limits of yesterday.

(387 U.S. at 416).

It should also be recognized that when an administrative agency undertakes to formulate a regulatory remedy for a condition which it is authorized to regulate, it has broad discretion in fashioning that remedy. In American Power & Light Company v. SEC, 329 U.S. 90 (1946), the Supreme Court said:

> It is a fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy "the relation of remedy to policy is peculiarly a matter for administrative competence." Phelps Dodge Corp. v. National Labor Relations Board, supra, (313 U.S. 194, 85 L.Ed. 1283, 61 S.Ct. 845, 133 ALR 1217).

(329 U.S. at 112).

* * * *

> In view of the rational basis for the Commission's choice [of remedy], the fact that other solutions might have been selected becomes immaterial. The Commission is the body which has the statutory duty of considering the possible solutions and choosing that which it considers most appropriate to the effectuation of the policies of the Act.

(329 U.S. at 118). See also Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282, 284 (D.C.Cir. 1966); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

Similarly, the Commission is entitled "to consider its total regulatory responsibilities when dealing with problems within a particular area of its jurisdiction." General Telephone Co. of California v. FCC, 413 F.2d 390, 399-400 (D.C. Cir.), cert. denied, 396 U.S. 888 (1969). See also United States v. Southwestern Cable Co., 392 U.S. 157 (1968); Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir.), cert. denied, 375 U.S. 951 (1963).

A. PTAR I Was Conceived As A Limited Restraint Upon Generally Desirable Network Operations

The Commission has long recognized that network operations are desirable and in the public interest. As long ago as 1953 the Commission observed:

> We have long recognized that network broadcasting is an integral and necessary part of radio, and we have more recently extended this recognition of the benefits of network broadcasting to the field of television. We have also recognized that the public interest is served by competition among the networks, both radio and television.

ABC-Paramount Merger Case, 17 F.C.C. 264, 348; 8 R.R. 541, 624 (1953) (footnotes omitted).

Five years later the Commission again observed:

> All groups concede that networks have made invaluable contributions to the public service in broadcasting through the major role they have played in the development of our national television system and the provision of a national program service of entertainment, news, and public service programming. Any action which might run the risk of undermining or destroying this vital segment of the broadcasting industry would seriously disserve the public interest.

Option Time Rules, 18 R.R. 1801, 1834 (1959).

In 1960 the Commission reiterated its conviction that "the national networks have made invaluable contributions in the development of our system of television broadcasting and that networking is necessary to continued growth and expansion of the service." Option Time Rules, 20 R.R. 1568, 1570 (1960).

The public importance of networking was again noted in the ABC Merger Case, 9 F.C.C.2d 546; 10 R.R.2d 289 (1967), where the Commission cited the ABC Television Network's competitive disadvantage as resulting in "adverse effects . . . on the public interest" (9 F.C.C.2d at 571; 10 R.R.2d at 316).

These views were affirmed in the Second Report and Order, where the Commission stated:

> We have noted on many occasions over the years the value of national network programming, and the contribution it makes to American television. (para. 37; JA-104)*/

At the same time, the Commission has long been mindful of its responsibility to take regulatory action to insure that network operations in their many and varied facets are wholly consistent with the public interest. This exercise of responsibility has been mandated by

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*/ Commission Rules and Policies have also been directed toward making network programs more widely available to the public. Thus, 47 C.F.R. §73.658(b), adopted in 1955 (see Revision of Territorial Exclusivity Rule, 12 R.R. 1537 (1955)), severely restricts territorial exclusivity in network affiliation agreements; and 47 C.F.R. §73.658(1), adopted in 1971 (see VHF Station Network Affiliations, 28 F.C.C. 2d 169; 21 R.R.2d 1638 (1971)) mandates the availability of network programs to particular stations under specified conditions. Also, the Commission has strongly supported the forced availability to other stations in the same community of network programs which affiliates elect not to broadcast. Availability of Network Programs to Non-Affiliates, 26 F.C.C.2d 772; 20 R.R.2d 1687 (1970).

47 U.S.C. §303(g), which provides for encouragement of "the larger and more effective use of radio in the public interest", and by 47 U.S.C. §303(i), which authorizes "special regulations applicable to . . . stations engaged in chain broadcasting". Over the past 30 years the Commission has adopted various network regulations (see 47 C.F.R.§§73.131-138(AM), 73.231-238(FM), and 73.658(a)-(l) (TV) -- consistently sustained by the Courts. National Broadcasting Co. v. United States, 319 U.S. 190 (1943); Metropolitan Television Company v. FCC, 289 F.2d 874 (D.C. Cir. 1961); and Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971).

In Network Television Broadcasting, 23 F.C.C.2d 382, 18 R.R.2d 1825 (1970), reconsideration generally denied, 25 F.C.C.2d 318, 19 R.R.2d 1869 (1970), aff'd sub nom. Mt. Mansfield Television, Inc. v. FCC, supra, the Commission adopted the Prime Time Access Rule (47 C.F.R. §73.658(k)) and the related Syndication and Financial Interest Rules (47 C.F.R. §73.658(j)). Even this decision, adopting the Prime Time Access Rule as a restraint upon network operations, implicitly recognized that such operations are essentially desirable; the Commission's goal was to place greater programming responsibility at the station level and

to create additional competitive opportunities for other segments of the television industry.*/ To this end, the Commission adopted a rule restricting network and similar programming to three hours, in the four-hour 7-11:00 p.m. period, per night. It selected this particular remedy, affecting at most 25% of prime time, as preferable to another considered remedy affecting 50% of all network programming, because it was concerned that the latter would impair competition among networks.

Thus, the Commission's experience has been that network operations generally serve the public interest. Regulation has not sought to undermine their contribution, but to make them otherwise compatible with Commission

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*/ In Availability of Network Programs to Non-Affiliates, 26 F.C.C.2d 772, 20 R.R.2d 1687 (1970), the Commission explained the relationship of the Prime Time Access Rule to its action supporting the forced availability of network programs to certain stations: "While the two actions are designed to further different public interest objectives, and to a degree may look in different directions, they are by no means inconsistent nor in conflict. In the present matter, we seek to make desirable network programming more generally available to other stations when it is not carried in a market by the regular affiliate, thus benefitting these stations and the public. . . . In the other action, we have sought to encourage the production of programs by independent sources through opening up to them a substantial economic base, a portion of prime time on the well established facilities (nearly all VHF) which are the network affiliates in the top 50 markets." (26 F.C.C. 2d at 789; 20 R.R.2d at 1706).

regulatory objectives. In framing network regulations, the Commission has chosen its remedies carefully, and has not hesitated to take cognizance of their significance for other regulatory policies. Thus, PTAR I which this Court approved in Mt. Mansfield, reflected the deliberate consideration of the Commission, based upon a voluminous record and an obvious expertise in the field, that this particular Rule was then the most desirable remedy to the conditions found to prevail and was consistent with other regulatory policies.

B. PTAR III Is A Slightly Modified Restraint Designed Both To Foster Program Source Diversity And To Maximize Program Service In The Public Interest

As this Court is aware from the Mt. Mansfield proceeding, the Prime Time Access Rule was controversial from its inception and its anticipated effects were uncertain. The Commission's decision adopting the Rule acknowledged that the results could not be guaranteed. See Network Television Broadcasting, 23 F.C.C.2d 382, at 401; 18 R.R.2d 1825, at 1850 (1970). The Commission's Brief in this Court even urged: "The possibility that the Rule may in practice prove ineffective is inherent in the rulemaking process and does not render it unreasonable." Recognizing the need in

these circumstances to maintain continuing scrutiny over the situation, the Commission held open its docket in which the Rule was adopted and specifically held out the prospect of review of the Rule's effectiveness. The expectation of on-going scrutiny was urged to this Court.

The Commission's Docket No. 19622 proceeding, whose Second Report and Order is here under review, constituted the further study and consideration of the Rule in operation to which the Commission was committed. While the study was initiated at an early stage and while some considered it premature, the decision of when to undertake the study was clearly discretionary with the Commission. Moreover, the study has proven comprehensive.

It is against this background that the Commission's Second Report and Order must be assessed and certain Petitioners' attack thereon, and specifically on PTAR III, must be judged.

Thus, contrary to certain Petitioners' suggestion, the Second Report and Order reveals that the Commission was fully mindful of the policy considerations which led to the Rule's adoption in the first instance (see paras. 15-17; JA-080-094). What the Commission did was not abandon the Rule's objectives but: (1) reaffirm those objectives; (2) essentially retain PTAR I; and (3) refine it into PTAR III,

in light of three-plus years of operating experience. In doing so, the Commission quite properly took into account the full range of relevant public interest considerations appropriate to the encouragement of the larger and more effective use of radio in the public interest. General Telephone Co. of California v. FCC, 413 F.2d 390, 399-400 (D.C.Cir. 1969). See also United States v. Southwestern Cable Co., 392 U.S. 157 (1968); Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir.), cert. denied, 375 U.S. 951 (1963). Such considerations included the extent to which access time programming was serving the public interest and the extent to which the public interest would be furthered by exempting a limited amount of network and off-network programming in particular program categories affected with the public interest. In short, the Commission refined its Rule so as to balance more precisely what it conceived were the public interest factors weighing for and against a particular restraint upon network operations, and the details of that restraint.

Apart from codifying certain waiver policies and making incidental refinements (in Exemptions (2)-(6), which are not here disputed by Petitioners favoring continuation of the Rule), the principal change is Exemption (1) for network and off-network children's, documentary and public affairs

programs. The basis of this Exemption was the Commission's finding that the Rule's operation had led to a reduction in such public interest-affected programs and, in the case of children's programs, their presentation at an inappropriately late time.*/ Second Report and Order, paras. 29-33; JA-099-102. To alleviate this concern the Commission refined the Rule to facilitate the presentation of such programs and at appropriate times -- if licensees so elected. In doing so by exemption, the Commission was careful to caution licensees not to abuse Exemption (1) in derogation of the basic purposes of the Rule (para. 34; JA-103).

Thus, the changes which the Commission has made in the Rule are small, responsive to experience under the Rule, and in pursuit of the statutory mandate to "encourage the larger and more effective use of radio in the public interest" (47 U.S.C. §303(g)). Accordingly, it is evident that the Commission did not "act as an umpire blandly calling balls and strikes for adversaries"; rather, it acted affirmatively to protect "the right of the public". Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965).

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*/ NAITPD claims that the networks could start their evening schedules earlier than 8:00 p.m., and thereby reach children without a children's program exemption. However, there are other reasons for the three national networks to commence their schedules at 8:00 p.m., as they do Monday-Saturday. Thus, on March 12, 1971, the Commission directed correspondence to the networks wherein it said: "Specifically, the Commission believes that the selection of an 8:00-11:00 p.m. time period would better serve the public interest as a general matter." Prime Time Rule, 21 R.R.2d 1596 (1971).

III. THE SEPTEMBER 1975 EFFECTIVE DATE FOR PTAR III IS REASONABLE IN THE CIRCUMSTANCES

Petitioners NAITPD and Frank challenge the September 1975 effective date for the Exemption (1) changes, to permit the broadcast of a limited amount of network and off-network children's, documentary and public affairs programs in access time. They rely particularly on the holding of this Court in NAITPD, supra, of June 1974, that changes in the Rule of the kind contemplated by PTAR II should have been accompanied by lead-time of at least 16 months -- comparable to that accorded the networks with respect to the October 1971 effective date for PTAR I.

The Commission's Further Notice Inviting Comments (JA-050) afforded the opportunity to advance suggestions with respect to the appropriate effective date for changes in the Rule. ABC's September 1974 Further Comments urged the Commission to "allow generous lead-time appropriate to the changes in the Rule which it decides upon". Thus, it was recommended that changes of the kind contemplated by Exemptions (2)-(6) could be implemented effective with the Fall 1975 Season, whereas more substantial changes, such as some of those contemplated by PTAR II and by PTAR III Exemption (1), should be accompanied by greater lead-time. ABC favored "generous" lead-time for more substantial changes

because such an approach was fairest to the access producers, would maximize industry stability, and was the course most clearly consistent with this Court's holding in NAITPD, supra.

The question which the NAITPD and Frank petitions pose is, in effect, whether the Exemption (1) changes, adopted as part of the Commission's further proceedings and announced in November 1974 to be effective in September 1975, come within the ambit of a mandatory 16 months lead-time. ABC believes that there are significant differences between the problem of lead-time which this Court considered in NAITPD, supra, and the problem today. It is ABC's view that these differences, identified hereafter, are sufficient to support the reasonableness of the Commission's decision that the public interest in implementing limited changes in the Rule overrides the benefits to be derived from greater lead-time.

Thus, PTAR III is a very limited change from PTAR I -- principally in the matter of an exemption for children's documentary and public affairs programs; while the use to which the PTAR III Exemption (1) is to be put is left indefinite, the Commission cautioned licensees and networks not to intrude into access time excessively. Further,

access producers have been on notice since January 1974 that the Commission was looking toward some relaxation of the Rule; since June 1974 that changes might take effect in September 1975; and since November 1974 of the nature of the specific changes to be incorporated into PTAR III and the September 1975 effective date. Finally, unlike the case of PTAR II where it was clearly anticipated that there would be an increase in the amount of network programming and this Court was properly concerned with whether additional "quality network programming will be ready by September 1974" (NAITPD, supra, at 254), PTAR III Exemption (1) does not specifically contemplate the return of any access time to the networks; rather, it creates an option which may be used consistent with the availability of additional quality network programming.

Accordingly, ABC considers the September 1975 effective date reasonable in the circumstances.

IV. CONCLUSION

For the foregoing reasons, ABC urges this Court to affirm the Commission's Second Report and Order adopting PTAR III. However, if the Court should conclude that the Commission has committed reversible error with respect to Exemption (1) or has set an unreasonably early effective date for the Exemption (1) change, ABC urges the Court to affirm the balance of the Commission's Second Report and Order and remand only for further consideration with respect to the Exemption (1) change or a later effective date therefor.

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March 3, 1975

APPENDIX A

Effective September 8, 1975, §73.658(k) of the Commission's Rules, the prime time access rule, is amended to read as follows:

§73.658 Affiliation agreements and network program practices.

* * * * *

(k) Effective September 8, 1975, television stations owned by or affiliated with a national television network in the 50 largest television markets (see NOTE 1 to this paragraph) shall devote, during the four hours of prime time (7-11 p.m. E.T. and P.T., 6-10 p.m. C.T. and M.T.), no more than three hours to the presentation of programs from a national network, programs formerly on a national network (off-network programs) or feature films which have previously appeared on a network:

provided, however, That the following categories of programs need not be counted toward the three-hour limitation:

(1) Network or off-network programs designed for children, public affairs programs or documentary programs (see NOTE 2 to this paragraph for definitions).

(2) Special news programs dealing with fast-breaking news events, on-the-spot coverage of news events or other material related to such coverage, and political broadcasts by or on behalf of legally qualified candidates for public office.

(3) Regular network news broadcasts up to a half hour, when immediately adjacent to a full hour of continuous locally produced news or locally produced public affairs programming.

(4) Runovers of live network broadcasts of sporting events, where the event has been reasonably scheduled to conclude before prime time or occupy only a certain amount of prime time, but the event has gone beyond its expected duration due to circumstances not reasonably foreseeable by the networks or under their control. This exemption does not apply to post-game material.

(5) In the case of stations in the Mountain and Pacific time zones, on evenings when network prime-time programming consists of a sports event or other program broadcast live and simultaneously throughout the contiguous 48 states, such stations may assume that the network's schedule that evening occupies no more of prime time in these time zones than it does in the Eastern and Central time zones.

(6) Network broadcasts of an international sports event (such as the Olympic Games), New Year's Day college football games, or any other network programming of a special nature other than motion pictures or other sports events, when the network devotes all of its time on the same evening to the same programming, except brief incidental fill material.

NOTE 1. The top 50 markets to which this paragraph applies on the 50 largest markets in terms of prime time audience for all stations in the market, as listed each year in the Arbitron publication Television Market Analysis. This publication is currently issued each November, and shortly thereafter the Commission will issue a list of markets to which the rule will apply for the year starting the following September.

NOTE 2. As used in this paragraph, the term "programs designed for children" means programs primarily designed for children aged 2 through 12. The term "documentary programs" means programs which are non-fictional and educational or informational, but not including programs where the information is used as part of a contest among participants in the program, and not including programs relating to the visual entertainment arts (stage, motion pictures or television) where more than 50% of the program is devoted to the presentation of entertainment material itself.

ATTACHMENT A

Attention is invited to the Commission's "Report and Statement of Policy Re: Commission En Banc Programming Inquiry" released July 29, 1960 - FCC 60-970 (25 Federal Register 7291; 20 Pike and Fischer Radio Regulation 1902).

Pursuant to the Communications Act of 1934, as amended, the Commission cannot grant, renew or modify a broadcast authorization unless it makes an affirmative finding that the operation of the station, as proposed, will serve the public interest, convenience and necessity. Programming is of the essence of broadcasting.

A broadcast station's use of a channel for the period authorized is premised on its serving the public. Thus, the public has a legitimate and continuing interest in the program service offered by the station, and it is the duty of all broadcast permittees and licensees to serve as trustees for the public in the operation of their stations. Broadcast permittees and licensees must make positive, diligent and continuing efforts to provide a program schedule designed to serve the needs and interests of the public in the areas to which they transmit an acceptable signal.

In its above-referenced "Policy Statement," the Commission has indicated the general nature of the inquiry which should be made in the planning and devising of a program schedule:

> "Thus we do not intend to guide the licensee along the path of programming; on the contrary, the licensee must find his own path with the guidance of those whom his signal is to serve. We will thus steer clear of the bans of censorship without disregarding the public's vital interest. What we propose will not be served by pre-planned program format submissions accompanied by complimentary references from local citizens. What we propose is documented program submissions prepared as the result of assiduous planning and consultation covering two main areas: first, a canvass of the listening public who will receive the signal and who constitute a definite public interest figure; second, consultation with leaders in community life—public officials, educators, religious (groups), the entertainment media - agriculture, business, labor, professional and eleemosynary organizations, and others who bespeak the interests which make up the community."

Over the years, experience has shown both broadcasters and the Commission that certain recognized elements of broadcast service have frequently been found necessary or desirable to serve the broadcast needs and interests of many communities. In the Policy Statement, referred to above, the Commission set out fourteen such elements. The Commission stated:

> "The major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located as developed by the industry, and recognized by the Commission, have included: (1) Opportunity for Local Self-Expression, (2) The Development and Use of Local Talent (3) Programs for Children, (4) Religious Programs, (5) Educational Programs, (6) Public Affairs Programs, (7) Editorialization by licensees (8) Political Broadcasts, (9) Agricultural Programs, (10) News Programs, (11) Weather and Market Reports, (12) Sports Programs, (13) Service to Minority Groups, (14) Entertainment Programming."

It is emphasized that broadcasters, mindful of the public interest, must assume and discharge responsibility for planning, selecting and supervising all matter broadcast by their stations, whether such matter is produced by them or provided by networks or others. This duty was made clear in the Commission's Policy Statement, page 14, paragraph 3:

> "Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they present to the public. With respect to advertising material the licensee has the additional responsibility to take all reasonable measures to eliminate any false, misleading, or deceptive matter and to avoid abuses with respect to the total amount of time devoted to advertising continuity as well as the frequency with which regular programs are interrupted for advertising messages. This duty is personal to the licensee and may not be delegated. He is obligated to bring his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast matter for transmission through his facilities so as to assure the discharge of his duty to provide (an) acceptable program schedule consonant with operating in the public interest in his community. The broadcaster is obligated to make a positive, diligent and continuing effort, in good faith, to determine the tastes, needs and desires of the public in his community and to provide programming to meet those needs and interests. This, again, is a duty personal to the licensee and may not be avoided by delegation of the responsibility to others."

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March 3, 1975

Clerk
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Dear Sir:

On behalf of American Broadcasting Companies, Inc., I am transmitting herewith 25 copies of its Brief in Case Nos. 75-4021 et al. Attached hereto is a Certificate of Service with respect to this Brief.

Very truly yours,

Thomas N. Frohock

Thomas N. Frohock

CERTIFICATE OF SERVICE

I, Thomas N. Frohock, a member of the Bar of the United States Court of Appeals for the Second Circuit, herewith certify that the Brief for Intervenor American Broadcasting Companies, Inc. in Case Nos. 75-4021 et al. has been served, either by postage prepaid First Class United States Mail or by hand, this 3rd day of March 1975, upon the following:

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